misgivings. The Massachusetts court has expressly declared a statute conferring the right to grant a partial new trial constitutional.[24] Moreover, the practice is not unknown in some federal courts in cases in which part of the issues only have been affected by some error of law in the trial or by some defect in the verdict.[25] The United States Supreme Court has not yet passed upon the question. When this question does squarely come before it, it is to be hoped that it will then allay the constitutional doubts now seemingly in the way of a procedural simplification as wise as it is expedient.

STARE DECISIS. — The doctrine of *stare decisis* is based upon the principle that certainty in law is preferable to reason and correct legal principles. This idea has become so firmly fixed in England that the House of Lords [1] and the Court of Appeal [2] hold that they have no power to reverse themselves on a proposition of law, no matter how erroneous their previous decision may have been. Practically all American jurisdictions, however, apply the doctrine with less and less rigidity, so that an overruled decision is by no means uncommon. The explanation of this difference in opinion is simple.

The varying conditions which exist in America geographically and politically have caused American jurisdictions to reconstruct many of the old common-law principles and to depart from them absolutely when expediency makes a change advisable. The different tests to determine navigability of streams on the question of the extent of admiralty jurisdiction,[3] the law as to liability of owners of domestic animals for trespass upon unfenced land,[4] and the riparian and priority doctrines as to the use of water [5] are but a few of the instances where courts have completely changed existing principles of law by the force of their decisions. Such departures are unquestionably wise. But the difficult situation arises where conditions have been altered but slightly, and yet upon the most careful consideration the old legal doctrine seems wrong although it has been reiterated in decision after decision. It is such situations which cause courts the greatest anxiety. The admission of the House of Lords that it cannot reverse itself on a proposition of law is one of weak-

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v. S. D. Cent. Ry., 26 S. D. 1, 127 N. W. 648 (1910); Auwater *v.* Kroll, 79 Wash. 179, 140 Pac. 326 (1914); Moss *v.* Campbell's Ry., 75 W. Va. 62, 83 S. E. 721 (1914). See More-Jones Glass Co. *v.* W. J., etc. Ry., 47 Vroom (N. J.), 9, 10, 69 Atl. 491, 492 (1908); Fry *v.* Stowers, 98 Va. 417, 422, 36 S. E. 482 (1900). *Contra*, Banaszek *v.* Mayer Boot & Shoe Co., 161 Wis. 404, 154 N. W. 637 (1915).

[24] Opinion of the Justices, 207 Mass. 606, 94 N. E. 846 (1911).

[25] Farrar *v.* Wheeler, 145 Fed. 482 (1906) (Cir. Ct. App.); Calaf *v.* Fernandez, 239 Fed. 795 (Cir. Ct. App.) (1917); Original 16–1 Mine *v.* 21 Mining Co., 254 Fed. 630 (Dist. Ct., N. D. Cal.) (1918).

[1] London St. Tramways Co. *v.* London County Council [1898], A. C. 375.

[2] Olympian Oil Cake Co. *v.* Produce Brokers Co., 112 L. T. R. 744 (1914).

[3] Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443 (1851); The Daniel Ball, 10 Wall. (U. S.) 557 (1870). See 33 HARV. L. REV. 458.

[4] Beinhorn *v.* Griswold, 27 Mont. 79, 69 Pac. 557 (1902).

[5] See Samuel C. Wiel, "Theories of Water Law," 27 HARV. L. REV. 530.

ness.[6] It would be even worse to discard the doctrine of *stare decisis* altogether. But have we not too high an opinion of our judiciary to admit that an absolute rule of *stare decisis* is necessary? The pride of our judges in their work and in the Anglo-American legal system should act as a constant check upon the natural tendency to let individual opinions change that which seems incorrect, but yet has sound legal reason behind it and has been held to be the law by our predecessors.

What are the considerations which should influence a court in deciding whether earlier decisions should be overruled? If the former decisions have resulted in a rule of property upon which the conduct of individuals has been modeled, a court should almost never depart from them. The necessity for a change seldom will outweigh the expediency of having a Gibraltar-like stability where vested interests are involved.[7]

A most troublesome and yet frequent case for the application of *stare decisis* is one where a contract has been made in reliance upon a decision, and in a subsequent lawsuit the court upon due reflection feels that the former decision is clearly wrong in the principle of law which it expounds. Should the court adopt the correct legal rule although it destroys the value of the contract? On the constitutional question involved much has been said, but the Supreme Court of the United States is definite in laying down the proposition that a decision overruling the earlier case does not come within the constitutional prohibition against impairing the obligation of contracts, that the prohibition only applies to impairment of contracts by legislative action.[8] But although not unconstitutional, yet courts should hesitate to change the law where contractual rights will be extinguished thereby.[9] Such a change should be made only when a court is positive that the old rule was unsound legally when laid down or has become so due to the rapidly changing surrounding circumstances. A case involving such questions should never be overruled if a reasonable judge under the circumstances could hold the law to be as formerly decided.

Where neither contracts nor rules of property are involved the question as to the need for certainty of the law as against the need for correct legal principles is much simpler. For instance, no one is entitled to rely upon the judicial interpretation of a statute that provides for disbarment in case of conviction of a felony, and the court should feel free to

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[6] See J. G. Kotze, "Judicial Precedent," 144 L. T. 349, 351, 391. It is a regrettable situation when Lord Justice Buckley speaking for the Court of Appeal in Olympian Oil Cake Co. *v.* Produce Brokers Co., *supra*, felt compelled to say, "I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning, such as they are, I should say that it is wrong. But I am bound by authority, which of course it is my duty to follow, and following authority I feel bound to pronounce the judgment which I am about to deliver." It is a relief to know that the House of Lords reversed this decision in [1916] 1 A. C. 314, as the precedents which the Lord Justice felt bound to follow were not decisions of the House of Lords.

[7] Braxon *v.* Bressler, 64 Ill. 488 (1872). See Yazoo & Miss. Valley R. R. Co. *v.* Adams, 81 Miss. 90, 114, 32 So. 937, 946 (1902).

[8] Central Land Co. *v.* Laidley, 159 U. S. 103 (1894); Cleveland & Pittsburg R. R. *v.* City of Cleveland, 235 U. S. 50 (1914); McCray *v.* Miller, 186 Pac. (Okla.) 1089 (1920). See Wilbur Larremore, "*Stare Decisis* and Contractual Rights," 22 HARV. L. REV. 182.

[9] Thomas *v.* State, 76 Oh. St. 341, 81 N. E. 437 (1907).

overrule an earlier construction. A recent California decision [10] which shifts the burden of overruling such a line of decisions to the legislature is open to the same criticism as the highest courts of England. In *Johnson* v. *Cadillac Motor Car Co.*[11] the court did not hesitate to overrule its earlier decision upon the identical case when upon careful reflection it determined that the principle of law which it had laid down was incorrect. It is refreshing to see a court willing to admit its error openly. When once a court has reached the conclusion that a prior decision is wrong it is much better to overrule it expressly than to purport to follow it and yet construct subtle distinctions every time the general principle involved arises. Such a straightforward attitude will go a great way in successfully combating the attack which is often launched against our so-called case law,[12] and will furnish an impetus for careful legal thought which, combined with our respect for and adherence to judicial precedents, will preserve the wonderful living characteristics of the Anglo-American legal system.[13]

EFFECT OF IMPOSITION BY IMPERSONATION IN THE LAW OF BILLS AND NOTES. — The recent case of *Montgomery Garage Co.* v. *Manufacturers' Liability Ins. Co.*[1] illustrates the problem presented by the not infrequent fraud of impersonation. A represented himself as X to the defendant and received a check drawn to X's order. The *bona fide* purchaser from A was allowed to recover on the ground that the defendant intended A rather than X as the payee and the proper person to indorse. The decision follows the present trend of authority.[2] This species of fraud is met with in other branches of the law;[3] and the problems arising therefrom are generally handled in the same way.

Upon analysis the question resolves itself into effectuating the intent of the victim, a matter of no small difficulty when it is considered that the defrauded party has more than one intent. Where the impostor is physically present, the intent of the victim to deal with the personality before him is deemed paramount.[4] The intent to deal with the individual whom the impostor is impersonating is *ex necessitate* disregarded. This is equally the law in Sales.[5] However, an unwarranted distinction is

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[10] *In re* Riccardi, 189 Pac. 694 (Cal.) (1920). See RECENT CASES, p. 93, *infra*.

[11] 261 Fed. 878 (Circ. Ct. App.) (1919). See RECENT CASES, p. 93, *infra*.

[12] See "The Law of the Case," 51 CAN. L. JOUR. 95, where a vigorous attack is made against the present-day methods of studying law and of making decisions.

[13] See Charles E. Blydenburg, "*Stare Decisis*," 86 CENT. L. JOUR. 388.

[1] 109 Atl. 296 (N. J. 1920). See RECENT CASES, p. 84, *infra*.

[2] United States *v.* Nat. Bank, 45 Fed. 163 (1891); Boatsman *v.* Stockmen's Nat. Bank, 56 Colo. 495, 138 Pac. 764 (1914); Metzger *v.* Franklin Bank, 119 Ind. 359, 21 N. E. 973 (1889); Emporia Bank *v.* Shotwell, 35 Kan. 360, 11 Pac. 141 (1886); Robertson *v.* Coleman, 141 Mass. 231, 4 N. E. 619 (1886); McHenry *v.* Citizens Bank, 85 Oh. St. 203, 97 N. E. 395 (1911); Land Title and Trust Co. *v.* Nat. Bank, 196 Pa. 230, 46 Atl. 420 (1900); Jamieson *v.* Heim, 43 Wash. 153, 86 Pac. 165 (1906).

[3] See WILLISTON, SALES, § 635; Clarence Ashley, "Mutual Assent in Contract," 3 COL. L. REV. 71. See also 68 U. OF PA. L. REV. 387.

[4] Robertson *v.* Coleman, *supra;* Famous Shoe Co. *v.* Crosswhite, 124 Mo. 34, 27 S. W. 397 (1894); Land Title and Trust Co. *v.* Nat. Bank, *supra;* Heavey *v.* Commercial Nat. Bank, 27 Utah, 222, 75 Pac. 727 (1904).

[5] Phillips *v.* Brooks, Ltd., [1919] 2 K. B. 243; Edmunds *v.* Merchants' Co., 135 Mass. 283 (1883); Phelps *v.* McQuade, 220 N. Y. 232, 115 N. E. 441 (1917).